Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEFAN DIETTRICH,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court have inherent power to deny a Fed.R.Civ.P. 50 motion for judgment as a matter of law due to the movant's serious misconduct in impermissibly relying upon post-verdict communications with jurors regarding the credibility of its key witness, whose truthfulness the movant had argued to the jury was critical to the verdict?

2. Does the Seventh Amendment to the U.S. Constitution preclude a court of appeals from reversing a unanimous age discrimination jury verdict under Fed.R.Civ.P. 50 where credibility evidence regarding the key defense witness was not addressed by the appellate court and this credibility evidence and additional circumstantial evidence permitted the jury to find age discrimination?

3. Does the Seventh Circuit's age discrimination proof methodology conflict with St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) and decisions of other circuit courts of appeal?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, published at 168 F.3d 961 (7th Cir. 1999), is set forth in App. A at 1a-12a. The decision and order of the district court granting attorney's fees, published at 967 F.Supp. 1132 (E.D. Wis. 1997) is set forth in App. B at 13a-19a. The district court's decision and order denying post-trial motions is set forth in App. C at 20a-33a. The district court's decision and order denying summary judgment is set forth in App. D at 34a-38a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. The decision of the court of appeals was entered on February 16, 1999.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

1. The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. 29 U.S.C. § 623(a)(1) and (2) provides:

> (a) It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or....

3. Fed.R.Civ.P. 50(b)(1) provides:

***

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alteratively request a new trial or join a motion for

a new trial under Rule 59. In ruling on a renewed motion, the court may:

> (1) if a verdict was returned:
>
> (A) allow the judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law; or

***

4. Eastern District of Wisconsin Local Rule 8.07 provides:

> Communication with Jurors. This rule applies to any communication before trial with members of the venire from which the jury will be selected, as well as any communication with members of the jury during trial, deliberations, and after the return of a verdict. No attorneys appearing in any branch of this court, or any of their agents or employees, shall approach, interview, or communicate with any member of the jury except on leave of court granted upon notice to opposing counsel and upon good cause shown. Good cause includes a trial attorney's request for permission to contact one

or more jurors after trial for the trial attorney's educational benefit. The juror(s) must be advised at the outset of any communication that his or her participation is voluntary. Any juror contact permitted by the court under this rule shall be subject to the control of the court.

5. Wisconsin Supreme Court Rule 3.5 provides:

> SCR 20:3.5 Impartiality and decorum of the tribunal
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other officials by means prohibited by law;
>
> (b) communicate *ex parte* with such a person except as permitted by law or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule a matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication; or
>
> (c) engage in conduct intended to disrupt a tribunal.

STATEMENT OF THE CASE

Stefan Diettrich filed his complaint against Northwest Airlines, Inc. ("Northwest") on September 24, 1994 and alleged that Northwest had discriminated against him because of his age (53), in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., when Northwest's decision maker, Russell Hinckley (age 33) did not select him for a management sales position during a reorganization underway in July, 1992.

Northwest moved for summary judgment which was denied by the district court. App. D at 34a-38a. The court determined that a jury could properly conclude that Northwest's justification for not hiring Diettrich was a pretext for two reasons: 1) Hinckley's review of Diettrich's qualities disregarded his experience (Diettrich had over thirty (30) years of experience in the airline industry)--a major quality set forth in the job description; 2) Hinckley's structured interview process and interview scores were flawed to Diettrich's detriment. The court expressly concluded that "Hinckley's credibility is at issue" and that a jury may disregard Hinckley's self-serving justification for flaws in the structured interview and may draw the reasonable inference that his hiring decision justification was a pretext. App. D at 38a.

At trial, Northwest's counsel asked Hinckley as his final question:

> Q. Now if Mr. Diettrich had given you the exact same answers on the structured interview questions that he in fact gave you, and everything else had been the same *except that he*

> *was younger*, would you have selected him for a position in the management sales force going forward after July of '92?
>
> * * *
>
> A. I would have done exactly the same thing.

App. E at 39a-40a. (emphasis added). After this direct testimony by Northwest's decision maker that age was not a factor in his decision, Northwest concluded its closing argument to the jury by stating:

> If you find in favor of Mr. Diettrich, that means you're finding that Russ Hinckley is a liar. And when Russ Hinckley said he did this not based on age, but because of his good faith belief that Mr. Diettrich didn't do well on that interview, you're calling him a liar and you are saying that he discriminated intentionally on the basis of age against Mr. Diettrich. He did not do that.

App. F at 41a. After a five-day jury trial, the eight-person jury returned a unanimous verdict which found that Northwest had discriminated against Diettrich on the basis of his age. After the jury returned its verdict, Northwest's counsel moved the district court for permission to talk to the jurors "for educational purposes," which was granted. App. C at 21a. Local Rule 8.07 for the Eastern District of Wisconsin expressly prohibits any communication with any member of the jury except upon good cause shown and leave of court. Because the trial was bifurcated by stipulation, a two-day

bench trial was later held on damages and the district court entered a decision which awarded Diettrich $7,311.23 in compensatory damages. App. C at 21a.

Subsequently, Northwest filed motions for judgment as a matter of law under Fed.R.Civ.P. 50, for a new trial under Fed.R.Civ.P. 59(a), and for an amended judgment under Fed.R.Civ.P. 59(e). Northwest's supporting reply brief made an express reference to communications with jury members regarding the critical issue of Hinckley's credibility:

> Northwest, frankly, is surprised at Diettrich's argument about Hinckley's credibility....[T]he parties engaged in a post-verdict dialogue with the jury regarding the reasons for their verdict. The jury most certainly did not conclude that Hinckley lied. If Diettrich is suggesting to the Court that *this* jury did, the suggestion is both incorrect and improper.

App. C at 22a. This representation by Northwest improperly "invite[d] the court to open that black box that is the jury room." App. C at 21a. The district court's decision and order denying Northwest's post-trial motions concluded:

> Northwest's reference to its discussion with jurors, however, was incorrect and improper--not Diettrich's argument that a jury could or did decide that Hinckley was lying. As a practical matter, the discussion occurred off the record. More importantly, the court allowed Northwest to approach jurors so that Northwest's attorneys could

> learn what worked and what did not. The attorneys could use that information for future trials. Nowhere did the court suggest or imply that granting the motion was a fishing expedition for Northwest to gather arguments for reversing the verdict.
>
> As the court has stressed, its role is to decide the scope of decisions a reasonable jury could make; why this jury decided the case the way it did is irrelevant to that decision. That is the foundation of a jury system. Northwest's reliance on its contact with jurors was improper and, by itself, justifies denying the motion for judgment as a matter of law.

App. C at 22a.

The court also found that "Diettrich submitted enough evidence for a reasonable jury to find discrimination." App. C at 22a. The experienced trial judge observed that the jury could infer that Hinckley's stated reason for not hiring Diettrich was a pretext for age discrimination. Further,

> A jury could decide that Hinckley's explanation for the [structured interview] deviations was not believable (certainly, the jury could have interpreted his stiff and uncomfortable demeanor as further support for that conclusion).

App. C at 24a. For example, the court noted that "Hinckley implemented the structural interview in a way that undermined its supposed benefits" and that a "jury could infer that those benefits were not the reason for using the structured interview." App. C at 23a. Although Hinckley was supposed to ask all candidates identical questions, "he asked Diettrich more questions than any other candidate and more difficult questions." App. C at 23a-24a. Diettrich's expert also testified that "Diettrich had a harder interview than candidates who were significantly younger than he was." App. C at 24a. The court concluded that the circumstantial evidence authorized the jury to decide that Northwest had discriminated against Diettrich on the basis of age. Subsequently, the district court entered a decision and order granting Diettrich attorney's fees of $97,005.00 and costs of $4,779.75.[1] App. B at 19a.

Northwest appealed to the Seventh Circuit from the denial of its motions for judgment as a matter of law and for a new trial, and also appealed the attorney's fees award.[2] The court of appeals reversed the district court's denial of judgment as a matter of law to Northwest and vacated the

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[1] The district court emphatically characterized Northwest's opposing argument that Diettrich's counsel had to have spent a substantial portion of the submitted time pursuing unsuccessful remedies--despite Diettrich's counsel's sworn affidavit to the contrary--as "a distasteful allegation" whose "implication is staggering." App. B at 15a.

[2] In its brief-in-chief to the Seventh Circuit, appellant Northwest totally ignored the district court's determination that "Northwest's reliance on its contact with jurors was improper and, by itself, justifies denying the motion for judgment as a matter of law." App. C at 22a.

award of damages and attorney's fees. The panel concluded that Northwest's misconduct in relying upon counsel's post-verdict dialogue with jury members was "clearly out of bounds" and was a "serious transgression" which violated both Local Rule 8.07 and Wisconsin Supreme Court Rule 3.5 (verbatim to ABA Model Rule of Professional Conduct 3.5).[3] The panel concluded, however, that the district court's inherent power to sanction conduct which abuses the judicial process did not authorize denial of Northwest's Fed.R.Civ.P. 50 motion.[4] App. A at 6a. The panel stated that although "the punishment must fit the crime," the "draconian remedy" ordered by the district court must be reversed. App. A at 6a. The panel concluded that "Diettrich was not prejudiced by Northwest's misconduct" and added: "We are equally certain that our review is untainted by Northwest's improper reference to the jury deliberations." App. A at 7a.

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[3] The panel's determination that counsel violated Wisconsin Supreme Court Rule 3.5 exceeded the misconduct finding of the district court.

[4] Nevertheless, the panel found that "[t]he district court appropriately chastised Northwest for its highly improper behavior." App. A at 6a. The court ordered that its opinion be transmitted to the Wisconsin Board of Attorneys Professional Responsibility (for the Supreme Court of Wisconsin) and added that the district court "may wish to reconsider its evaluation of the proper course of action in light of our decision...." App. A at 7a. The panel's referral to the Supreme Court of Wisconsin also exceeded the remedial action taken by the district court.

On the merits, the panel totally ignored the critical issue of Hinckley's credibility. The panel reviewed (some) evidentiary excerpts relevant to Diettrich's argument that the interview process was administered to his detriment:

-- Northwest never trained Hinckley to conduct interviews;

-- Hinckley abandoned Northwest's interview guide format;

-- Hinckley asked Diettrich different and "more difficult" questions that he did the other candidates;

-- (Nevertheless) Hinckley gave Diettrich a shorter interview than to the other candidates;

-- Hinckley disregarded Diettrich's resume and cover letter[5];

-- Hinckley did not inquire about Diettrich's extensive work history and sales experience with Northwest and predecessor airlines.

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[5] While Hinckley could not have known Diettrich's age solely by "eye-balling" him, he had previously reviewed Diettrich's application letter and resume detailing over thirty (30) years of professional employment.

The panel also considered evidence that among the twelve (12) candidates who reapplied for the account manager positions, the youngest candidate received the highest score, while the three oldest candidates scored lowest--including Diettrich, the oldest candidate who scored the lowest. The panel concluded that "the evidence did not justify submitting the case to the jury in the first instance." App. A at 11a. Circuit Judge Flaum dissented from the panel's disposition of Northwest's misconduct which invited the trial judge to revisit the issue and directed the opinion to the Wisconsin Board of Attorneys Professional Responsibility. In his view, had the district court "chosen, as an initial matter, to impose a harsher sanction I would not take exception to such a result." App. A at 11a.

ARGUMENT

I. A district court has inherent power to deny a Fed.R.Civ.P. 50 motion for judgment as a matter of law due to the movant's serious misconduct in impermissibly relying upon post-verdict communications with jurors regarding the credibility of its key witness, whose truthfulness the movant had argued to the jury was critical to the verdict.

A district court's exercise of its inherent power should be reversed only for abuse of discretion. Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991); English v. Cowell, 969 F.2d 465, 472 (7th Cir. 1992); McCandless v. Great A & P Tea Co., 697 F.2d 198, 201-02 (7th Cir. 1983); Copeland v. Martinez, 603 F.2d 981, 984 (D.C. Cir. 1979), cert. denied, 444 U.S. 1044 (1980). This petition raises an important question of national import regarding the propriety

of a district court's exercise of inherent power, here *not* to vacate a jury verdict due to the movant's misconduct linked to evidence submitted to the jury.[6]

Although the court of appeals stated that its review of the district court's exercise of inherent power and subsequent merits review was untainted by Northwest's reference to juror interviews regarding the credibility of its key witness, nevertheless, the panel steered away from *any* consideration of Hinckley's credibility--a jury determination generally not subject to reversal by a court of appeals.[7] The panel's failure to address the jury's verdict in light of the material credibility determination placed before the jury by the party guilty of misconduct clearly *did* prejudice Diettrich.[8] Had Northwest's

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[6] The propriety of Northwest suffering the consequences for its counsel's misconduct is beyond dispute. See Link v. Wabash R. Co., 370 U.S. 626, 633-34 n. 10 (1962), reh'g denied, 371 U.S. 873 (1962).

[7] Even raising credibility on appeal as a basis for reversal subjects counsel to sanctions. See Ashkin v. Time Warner Cable Corp., 52 F.3d 140, 146 (7th Cir. 1995); Rennie v. Dalton, 3 F.3d 1100, 1110-11 (7th Cir. 1993), cert. denied, 510 U.S. 111 (1994). Sanctions were awarded to the defendants in both cases in which the plaintiffs appealed from adverse credibility determinations by judges; in Rennie, the appeal was deemed frivolous.

[8] No one outside of the jury "black box" properly can know the extent to which the jury disbelieved Hinckley, believed Hinckley, or made no determination regarding his truthfulness. Northwest asserted, based on its jury misconduct, that the jury believed Hinckley. Hypothetically, *if* Northwest's improper representation is accurate, the jury properly may have decided that Diettrich's credibility and the cumulative circumstantial evidence outweighed Hinckley's testimony, or the jury may have decided

counsel candidly informed the district court that he intended to interview jury members regarding their credibility determinations in order to attack the jury verdict, he would have been denied permission. Fed.R.Evid. 606(b) expressly prohibits a juror from testifying in any inquiry regarding the validity of a verdict "concerning the juror's mental processes in connection [with the verdict]." It has long been recognized as inappropriate for a party to attack a jury verdict based upon the jury's internal deliberations. See McDonald v. Pless, 238 U.S. 264, 268 (1915). "The unbridled interviewing of jurors could easily lead to ... exploitation of their thought processes, and to diminished confidence in jury verdicts ...." United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985), cert. denied, 474 U.S. 901 (1985). "Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict ...." Tanner v. United States, 483 U.S. 107, 121 (1987). Northwest's jury interview assertion to the district court served as (hearsay) proxy testimony on a critical credibility issue--testimony which would have been absolutely inadmissible if solicited directly from any juror. Furthermore, it was impossible for Diettrich to rebut Northwest's assertion[9].

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that Hinckley was not conscious of his own bias, or perhaps Northwest's assertion is empirically limited, e.g., how many jurors did counsel interview, what exactly did each say regarding Hinckley's credibility, etc. Having rolled the credibility dice with the jury in its calculated closing statement, and by its misconduct, Northwest lacked clean hands and legal authority for the court of appeals to cover its credibility gambit.

[9] Fed.R.Civ.P. 41(b) and (c) subjects a plaintiff to dismissal for failure to comply with a court order--even without any showing of prejudice to the defendant. Nor is a finding of prejudice required before a district court exercises its inherent power to

Northwest invited the district court to usurp the exclusive function and power of the jury to determine credibility and to weigh conflicting evidence. See Guilbeau v. W.W. Henry Co., 85 F.3d 1149, 1161 (5th Cir. 1996); reh'g denied, 95 F.3d 56 (1996), cert. denied, 519 U.S. 1091 (1997); Bhaya v. Westinghouse Electric Corp., 832 F.2d 258, 262 (3rd Cir. 1987), cert. denied, 488 U.S. 1004 (1989) ("[e]valuation of witness credibility is the exclusive function of the jury.") Had the trial court been the original factfinder and chose to believe Diettrich's testimony and to discredit Hinckley's testimony--even if both witnesses told coherent and plausible stories not contradicted by extrinsic evidence--the court's credibility finding "can virtually never be clear error." Anderson v. Bessemer City, North Carolina, 470 U.S. 564, 575 (1985).

Consequently, the inherent power of the district court to protect the integrity of the judicial process and the sanctity of the jury verdict warranted the denial of Northwest's motion for judgment as a matter of law. It was not an abuse of discretion for the district court to deny Northwest's Fed.R.Civ.P. 50 motion for serious misconduct inherently linked to that motion. See Chambers v. NASCO, Inc., 501 U.S. 32, 43-45 (1991) (inherent power includes sanctions power to enter a default judgment); Shepherd v. American Broadcasting Companies, 62 F.3d 1469, 1474-75 (D.C.Cir. 1995) (default judgment or dismissal appropriate where misconduct linked to dispositive issues). This Court has expressly upheld case dismissals as appropriate sanctions in

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sanction. "Undoubtedly, there are situations in which we will defer to the district court's decision to ... enter judgment even in the absence of substantial adverse impact ...." Barnhill v. United States, 11 F.3d. 1360, 1368 (7th Cir. 1993).

circumstances of bad faith.[10] See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (inherent power authorized vacating judgment obtained by fraud; compare Fed.R.Civ.P. 60(b)(3)), overruled on other grounds, Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976); Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962) (inherent power authorized case dismissal with prejudice for want of prosecution). See also Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118-19 (1st Cir. 1989) (fraud on the court warrants dismissal); Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982) (courts may dismiss an action "to ensure the orderly administration of justice and the integrity of their orders"). Other inherent power sanctions available to district courts include preclusion of defenses or evidence, or drawing adverse evidentiary inferences--remedies implicit in the district court's denial of Northwest's motion.[11] See Gregory P. Joseph, Sanctions:

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[10] Because Northwest had already received a full blown jury trial, no constitutional limitations exist regarding the district court's power to terminate this case by denial of Northwest's post-verdict motion. See Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958).

[11] The Seventh Circuit has upheld a district judge's inherent power to treat a party's factual evidence as uncontested and binding in order to enforce local rules about summary judgment. See Day v. Northern Indiana Public Service Corp., 164 F.3d 382, 383 (7th Cir. 1999). That approach authorized the district court to treat the jury's verdict for Diettrich as uncontested and binding on the credibility and circumstantial evidence discrediting Hinckley. The Seventh Circuit has held that in order to demonstrate pretext, a plaintiff must show that the employer *lied* about its proffered explanation. See Russell v. Acme-Evans Co., Inc., 51 F.3d 64, 68 (7th Cir. 1995). Thus, Northwest's improper assertion that the jury

The Federal Law of Litigation Abuse § 28(A) (2d ed. 1994) (summary of inherent power sanctions with citations).

A bedrock principle of our legal system was violated--litigants and judges are forbidden from opening the jury "black box". Northwest's jury misconduct also inherently harmed the integrity of the individual jurors who were improperly interviewed and "undermine[d] public confidence in the fairness of our system of justice." Batson v. Kentucky, 476 U.S. 79, 87 (1986). Like the trouble released from Pandora's box, Hinckley's credibility determination cannot be returned to its rightful repose--the sanctified jury room. The Supreme Court should accept this case to affirm the core principle of our jury system that the jury's integrity may not be violated without the imposition of sanctions appropriate to the misconduct.

II. The Seventh Amendment to the U.S. Constitution precludes a court of appeals from reversing an age discrimination jury verdict under Fed.R.Civ.P. 50 where credibility evidence regarding the key defense witness was not addressed by the appellate court and this credibility evidence and additional circumstantial evidence permitted the jury to find age discrimination.

This age discrimination case raises nationally-significant and fundamental issues regarding the respective

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found that Hinckley had not lied inherently tainted all subsequent judicial consideration of that issue. On appeal, Diettrich was foreclosed from disproving Northwest's assertion.

domains of juries and judges. The ADEA expressly provides for a jury trial. 29 U.S.C. § 626(c)(2).[12] Congress therein implicitly ratified the belief and intent of the "Founding Fathers" when the Seventh Amendment was adopted: "Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach." Parklane Hosiery v. Shore, 439 U.S. 322, 344 (1979) (Rehnquist, J. (now C.J.), dissenting). Since 1791, juries have been empowered under the U.S. Constitution to find facts and reach results with which presiding judges and appellate judges disagree. The Seventh Amendment was adopted due to concern whether the right to jury trial in civil cases was adequately preserved in the original Constitution. The reexamination clause of the Seventh Amendment literally prohibits courts from invading the factfinding province of the jury. Also, by the express guarantee of the Seventh Amendment, the right to jury trial was secured "in the fullest latitude of the common law" and placed "upon the high ground of constitutional right." Joseph Story, Commentaries on the Constitution of the United States, § 919 at 654 (Rotunda & Nowak ed., Carolina Academic Press 1987) (1833). The common law in 1791 permitted a court to review a jury verdict by sustaining a demurrer to the evidence. However, a demurrer was available only when *no* evidence was offered to prove the particular matter. See Pawling v. United States, 8 U.S. (4 Cranch) 219, 221-22 (1808).

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[12] In Kolstad v. American Dental Ass'n, No. 98-208 (March 1, 1999), the petitioner has argued that a central purpose of the 1991 Civil Rights Act, 42 U.S.C. § 1981a(c)(1), to ensure a statutory right to trial by jury when compensatory or punitive damages are sought, should not be frustrated by judicially-imposed evidentiary hurdles.

In Kennon v. Gilmer, 131 U.S. 22, 27-29 (1889), the Supreme Court stated that the Seventh Amendment prohibited reexamination of facts determined by a jury; consequently, a federal court lacked authority to substitute its own judgment on damages for the jury's determination. In the oft-cited case of Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913), the Supreme Court held that entry of a JNOV was a violation of the Seventh Amendment. However, present Fed.R.Civ.P. 50(b) practice was distinguished and approved in Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935) (ruling on motions for directed verdicts deemed a reservation of legal ruling which tested the legal sufficiency of the evidence pursuant to prior common law practice). The Court implied that the Seventh Amendment would be violated if sufficient evidence was present and the court reversed the jury verdict. "The court, however, could never remove from the jury the function of weighing evidence and determining the credibility of witnesses." Matteson v. Dallas Carrier Corp., 947 F.2d 95, 107-08 (4th Cir. 1991). The Supreme Court recently held, relying upon Kennon, that a court of appeals writ of mandamus which required the district court to enter judgment for a lesser amount than that awarded by the jury, without allowing the plaintiff the option of a new trial, violated the Seventh Amendment. See Hetzel v. Prince William County, Virginia, 523 U.S. 208 (1998) (per curium).

In Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996), the Supreme Court held that New York's law controlling compensation awards for excessiveness or inadequacy may be applied by federal judges without violating the Seventh Amendment. The respective majority and dissenting opinions undertook detailed historical analyses of the Seventh Amendment's reexamination clause. Pertinent to

the Seventh Amendment issue in this case, however, is the following historical recital:

> But the practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment.
>
> That Amendment was Congress's response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure the right to trial by jury in civil actions in federal court. The desire for an explicit constitutional guarantee against reexamination of jury findings was explained by Justice Story, sitting as Circuit Justice in 1812, as having been specifically prompted by Article III's conferral of "appellate Jurisdiction, both as to Law and Fact" upon the Supreme Court. "[O]ne of the most powerful objections urged against [the Constitution]," he recounted, was that this authority "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." United States v.

> Wonson, 28 F.Cas. 745, 750 (No. 16,750)(C.C.Mass).[1]
>
> The second clause of the Amendment responded to that concern by providing that "[i]n [s]uits at common law ... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." U.S. Const., Amdt. 7. The Reexamination Clause put to rest "apprehensions" of "new trials by the appellate courts," Wonson, 28 F.Cas., at 750, by adopting, in broad fashion, "the rules of the common law" to govern federal-court interference with jury determinations.[2] The content of that law was familiar and fixed.

Id. at 450-51 (Scalia, J., dissenting) (footnotes omitted).

Here, the court of appeals essentially held a "new trial" of the evidence, excluded consideration of all evidence regarding the credibility of the key defense witness, and subjectively interpreted excerpts from the circumstantial evidence considered by the jury--appellate reexamination of facts which violated the Seventh Amendment. In so doing, the panel impermissibly substituted its judgment of the evidentiary record for the judgment of the eight sworn jurors.[13]

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[13] See Eric Schnapper, Judges Against Juries--Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. Rev. 237, 259-313 for historical and empirical analyses of appellate reversals of jury liability determinations predicated on witness credibility, inference drawing, and the sufficiency of evidence--circumstances

III. The court of appeals decision conflicts with the proof methodology set forth in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) and as adopted by other circuit courts of appeal.

The Supreme Court has determined:

> The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and ... no additional proof of discrimination is *required*.

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-11 (1992) (footnote and internal citation omitted). See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (ADEA jury not required to defer to employer's proffered reason).

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which may violate the Seventh Amendment. "[L]eft to their own devices, a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box." Id. at 354. That occurred in this case. See also Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 758-64 (1957)(analysis of Seventh Amendment implications of appellate reversals of jury verdicts).

Previously, the Seventh Circuit held that Hicks adopted a version of the "pretext-only" rule which allows the jury to find intentional discrimination if the employer offered a false or pretextual reason for the employment decision. Collier v. Budd Co., 66 F.3d 886, 893 n.11 (7th Cir. 1995). Under the "pretext-only" rule, the jury's rejection of the employer's proffered reason--by itself--is sufficient to permit a finding of discrimination and "no additional proof of discrimination is required." Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994), (quoting Hicks, 509 U.S. at 511); see Loyd v. Phillips Brothers, 25 F.3d 518, 522 (7th Cir. 1994). As was stated in Anderson:

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn.

13 F.3d at 1124. See also Perdomo v. Browner, 67 F.3d 140, 145 (7th Cir. 1995) (also quoting Hicks).

In this case, however, the Seventh Circuit wholly rejected the Hicks proof methodology. Northwest implored the jury to find that Hinckley was credible when he denied any discriminatory bias toward Diettrich. The jury was instructed by the court that it was appropriate to evaluate and decide upon the credibility of witnesses. Resolution of the material credibility issue posed by Northwest as a mandatory evidentiary hurdle for plaintiff to overcome, plus the mosaic of circumstantial evidence (only partially examined by the court of appeals), permitted the jury to infer the ultimate fact of intentional discrimination. So Hicks states. So the jury found.

Under the Hicks methodology, and well-settled principles of appellate review under Fed.R.Civ.P. 50, the panel was not authorized to ignore the core credibility evidence and to substitute its view of the other circumstantial evidence for the jury's determination thereon.[14] "Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded." United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1952). "A testimonial conflict [on a material issue] can be resolved only by the jury; it prevents the grant of a motion for judgment as a matter of law under Rule 50(a)." 9 C.A. Wright & A.R. Miller, Federal Practice and Procedure, § 2527 (1971 & Supp. 1989). Although denial of a motion for judgment as a matter of law is

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[14] As the Eighth Circuit articulated in Denesha v. Farmers Ins. Exchange, 161 F.3d 491, 497 (8th Cir. 1998):

> In reviewing a denial of a motion for judgment as a matter of law, we must (1) consider the evidence in the light most favorable to Denesha, (2) assume that all conflicts were resolved in favor of Denesha, (3) assume as proved all facts that Denesha's evidence tended to prove, (4) give Denesha the benefit of all favorable inferences that may reasonably be drawn from the proved facts, and (5) deny the motion unless all the evidence points one way and is susceptible of no reasonable inferences sustaining Denesha's position.

The Seventh Circuit's overflight of the evidentiary record did not approach this analysis.

"reviewed *de novo*, [it is] limited to a very narrow scope." Pierce v. Atchison Topeka and Santa Fe Railway Co., 110 F.3d 431, 438 (7th Cir. 1997)(ADEA case). The panel disregarded its own proscription against re-weighing the evidence:

> There was evidence on both sides of the age discrimination argument before the jury. The jury chose to believe IDHR's version of events and not the plaintiff's, which is the end of the matter as far as any evidentiary challenge goes.

Salvato v. Illinois Dept. of Human Rights, 155 F.3d 922, 926 (7th Cir. 1998). The Seventh Circuit also disregarded its own principle of giving "special deference" to the district court's assessment of the jury's consideration of Hinckley's credibility. United States v. Ramunno, 133 F.3d 476, 481 (7th Cir. 1998).

The panel was required to apply the Hicks methodology in reviewing the jury verdict--as the district court did in upholding the verdict. A holistic review of the evidence required the panel to affirm the verdict because the panel's role was "limited to assessing whether no rational jury could have found for the plaintiff." Emmel v. Coca-Cola Bottling Co., 95 F.3d 627, 630 (7th Cir. 1996).[15] Under

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[15] The Seventh Circuit has stated:

> [A]s we have noted before, "we are particularly careful in employment discrimination cases to avoid supplanting our view of the credibility or weight of the evidence for that of both the jury (in its verdict) and the judge (in not

Hicks, the jury was *permitted* to enter a rational verdict for Diettrich based on the evidentiary record.

Furthermore, the Seventh Circuit's non-Hicks methodology herein starkly conflicts with that of other post-Hicks courts of appeals. There is a split among the courts of appeals over the correct interpretation of the Hicks test for inferring discrimination. Several circuits interpret Hicks as holding that a factfinder may infer discrimination by the showing of pretext alone. See, e.g., Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066-67 (3rd. Cir. 1996) (en banc), cert. denied, 521 U.S. 1129 (1997) (jury may infer intentional discrimination from "elements of a *prima facie* case and disbelief of the defendant's proffered reasons ...."); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (dispute regarding employer's proffered

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interfering with the verdict)." Hybert v. Hearst Corp., 900 F.2d 1050, 1054 (7th Cir. 1990), quoted in Emmel, 95 F.3d at 630.

Tuohey v. Chicago Park Dist., 148 F.3d 735, 740 (7th Cir. 1998). See Williams v. Pharmacia, Inc., 137 F.3d 944, 949 (7th Cir. 1998) (jury *could* have credited testimony that female plaintiff compared favorably to male employees and expert's opinion that employer's sales objectives for her were unreasonable, thus permitting a rational inference of discrimination, particularly because the court of appeals may not supplant its "`view of the credibility or weight of the evidence for that of both the jury ... and the judge (in not interfering with the verdict)....'" (citing Hybert v. Hearst Corp., 900 F.2d 1050, 1054 (7th Cir. 1990)). Credibility is often crucial in employment discrimination cases. See Wohl v. Spectrum Mfg., Inc., 94 F.3d 353, 355 n.1 (7th Cir. 1996). Appellate review of credibility determinations is extremely limited. See Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993).

explanation defeats summary judgment); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083 (6th Cir. 1994) (under Hicks, jury may draw inference of discrimination if employer's explanation unworthy of belief); Kline v. Tennessee Valley Auth., 128 F.3d 337, 347 (6th Cir. 1997) (jury may infer discrimination after plaintiff demonstrates pretext); Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995) (review of summary judgment) ("Discriminatory animus may be inferred from the simple showing of pretext."); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) (factfinder may infer discrimination from proof of a *prima facie* case "and showing of pretext without anything more ...."). The Eleventh Circuit's analysis in Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997), also agreed with the Ninth Circuit's interpretation of Hicks.

Other circuits agree that Hicks determined that a jury *may* infer discrimination from a showing of pretext, but that there may be circumstances where some measure of additional evidence is needed. See, e.g., Fisher v. Vassar College, 114 F.3d 1332, 1337 (2d Cir. 1997) (although factfinder may infer discrimination from pretext, "[d]iscrimination does not lurk behind every inaccurate statement."); but see EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (finding of pretext allows jury to reject proffered reason and permits ultimate inference of discrimination); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc) (although evidence of pretext allows a jury to infer discrimination, in some cases additional evidence may be needed). In Troy v. Bay State Computer Group, 141 F.3d 378, 381 (1st Cir. 1998), the First Circuit held that under Hicks a jury could conclude that the employer was liable for gender discrimination "if poor attendance was a pretext and the actual reason was her pregnancy" because the jury was not

obliged to accept the employer's explanation, and the district judge was not clearly erroneous in reaching the same conclusion, notwithstanding conflicting evidence. In Ryther v. KARE II, 108 F.3d 832, 838 n. 5 (8th Cir. 1997) (en banc), cert. denied, 521 U.S. 1119 (1997), the Eighth Circuit extensively analyzed age discrimination pretext principles and upheld a jury verdict grounded on rejection of the employer's credibility and proffered explanation and belief of the plaintiff's version of events. But see Shaw v. HCA Health Servs. of Midwest, Inc., 79 F.3d 99, 100 (8th Cir. 1996) (plaintiff's *prima facie* case plus evidence of pretext is sufficient to sustain a jury verdict).

Recently, in AKA v. Washington Hospital Center, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc) (review of summary judgment decision), the court of appeals addressed the meaning of Hicks and concluded that "the plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case. . . ." As is relevant to the material credibility issue herein, the court added:

> [A] lie is evidence of consciousness of guilt. The jury can conclude that an employer who fabricates a false explanation has something to hide; that "something" may well be discriminatory intent.

Id. at 1293. Cf. Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996) (factfinder's rejection of employer's nondiscriminatory reasons suffices to permit a finding of discrimination).

Although there is analytical rhetorical disagreement between the circuit courts of appeal--appropriate for resolution by this Court--nevertheless, the jury herein was entitled to enter a rational verdict for Diettrich under any Hicks analysis.

Here, the Seventh Circuit never addressed the jury's prerogative to disbelieve Northwest's decision maker--which Northwest essentially dared the jury to do.[16] Because the jury could rationally disbelieve Hinckley's testimony, the jury was entitled to make the ultimate finding of discrimination. The jury's consideration of credibility evidence, coupled with its sifting of the circumstantial evidence and expert opinions before it, is not subject to second-guessing by the court of appeals without violating the Hicks evidentiary methodology. "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." Lavender v. Kurn, 327 U.S. 645, 653 (1946). "The jury's factual determinations as a general rule are final." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 625 (1991).

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[16] The ultimate question of discrimination was dedicated to "the trier of fact, whose function is to choose among competing inferences and make credibility determinations." Courtney v. Biosound, 42 F.3d 414, 424 (7th Cir. 1994). When "there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, North Carolina, 470 U.S. 564, 574 (1985) (review of findings of fact under Fed.R.Civ.P. 52(a) which requires "due regard" to court's assessment of witness credibility). A court of appeals is required to give greater deference to a jury verdict than to the factual findings of a judge. See Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1139 (7th Cir. 1992).

Therefore, the Court should accept this case in order to remedy the Seventh Circuit's failure to apply appropriate Hicks proof methodology, which resulted in the impermissible vacating of a unanimous jury verdict.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed: February 16, 1999]

No. 97-2831

Appeal from the United States District Court
for the Eastern District of Wisconsin

STEFAN DIETTRICH,
Plaintiff-Appellee,

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellant.

Before FLAUM, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge. When Northwest Airlines reorganized its sales department in the summer of 1992, Stefan Diettrich, a 28-year veteran of the airline's sales force, lost his job. Northwest claimed that it terminated Diettrich because he failed to demonstrate the kind of aggressiveness and drive the company needed to survive in the increasingly competitive market for air travel. Diettrich maintained the real reason was his age (53) and brought this

suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 *et seq*. After a jury returned a verdict in Diettrich's favor and the district court entered an award for damages and attorneys' fees, Northwest moved for judgment as a matter of law or, in the alternative, a new trial. The motion was denied. For the reasons that follow, we reverse the judgment of the district court.

I

From 1967 until 1992, Diettrich worked as an account manager for Northwest Airlines (or its predecessors, North Central and Republic Airlines) in its Milwaukee office. In that capacity, he was responsible for convincing travel agencies and businesses to use Northwest. To that end, he made sales calls, talked with customers, and solved customers' problems. By all reports, he had been quite successful in his job. For example, he had been recognized by serving as the chair of the Milwaukee Airlines Managers Association, and he had well-developed relationships with key travel industry personnel throughout the area.

Unfortunately, as of the summer of 1992, Northwest (like many other airlines) was facing financial difficulties: fuel prices were skyrocketing, passenger travel was depressed because of the fallout from the Persian Gulf War, and a competing airline had just decided to establish a new pricing structure that dramatically cut the price of business travel. Business fares are the bread and butter of any major air carrier, and a decline in corporate business would have been catastrophic for Northwest. Northwest decided that it needed to reorganize its sales force to pursue corporate accounts more aggressively. Although the reorganization did not (at least at

that time) involve a reduction in force, no salesperson was guaranteed a position. Instead, they all had to re-apply formally for their jobs.

In re-evaluating its employees for purposes of "rehiring," Northwest decided not to rely on past job evaluations, which the company believed were inflated. Instead, it opted to select its candidates for sales positions principally on the basis of one-on-one interviews. Russell Hinckley, a regional director of sales for Northwest, was given the responsibility for conducting those interviews for employees in the greater Chicago region, which included Diettrich's Milwaukee office. Although Northwest supplied Hinckley with a 14-page interview guide detailing techniques and questions designed to help him identify desirable candidates, it did not otherwise train him in interviewing techniques.

Taking the company at its word, Hinckley placed little weight on the cover letter and resume Northwest required each employee to furnish in connection with her job application, and he emphasized the interviews. Hinckley testified that he was looking for answers that demonstrated that the candidates were aggressive, results-oriented people who understood the critical situation the airline was in and the need to change the way the sales force was doing business.

Hinckley interviewed 12 Northwest employees, including Diettrich, who had re-applied for a position as an account manager. At the time, Hinckley did not know the ages of the candidates, who ranged from 28 to 53 years old. At 53, Diettrich was the oldest, though not by much--the next oldest were 52 and 51, respectively. Although Hinckley was not

required to fill the account manager positions with current employees, there were enough positions available so that he could have re-hired each of the 12 applicants.

By chance, Hinckley interviewed Diettrich first. Perhaps because of that fortuity, Hinckley experimented on Diettrich with several questions that he abandoned in later interviews. As a result, Diettrich faced different questions from those posed to the other applicants, including the two other applicants who were over 50. Diettrich's interview, which lasted 30 minutes, was also ten minutes shorter than the interviews given to the others. Hinckley assigned a numerical rating to each interviewee and took notes on his subjective impressions. Of the 12 employees interviewed, Diettrich received the lowest score. The next oldest candidates, the 52-year-old and the 51-year-old, received the next lowest scores. After conducting the interviews, Hinckley re-hired everyone except Diettrich. He filled the remaining account manager positions with Northwest employees from different departments and with external candidates.

Convinced that age discrimination was at work, Diettrich filed this ADEA suit against Northwest. The parties agreed to sever the liability and damages portions of the case. The jury was to determine liability and, if it found liability, it was also to decide whether Northwest's actions were "willful" for purposes of liquidated damages. The parties agreed that the district court would decide all other issues pertaining to damages. After the district court denied Northwest's motion for summary judgment, the case went to trial. The jury found in favor of Diettrich on his claim of age discrimination, but it also found that Northwest's actions were not willful. The district court then awarded Diettrich $7,311.23 as back pay

damages, commenting later in its decision and order on fees that this award "largely reject[ed] [Diettrich's] theory of damages." After denying Northwest's alternative post-trial motions for judgment as a matter of law or a new trial, the court awarded Diettrich $101,784.75 in attorneys' fees and costs.

II

Before we turn to the substance of Diettrich's ADEA claim, we must address a disturbing episode of attorney misconduct that marred the course of the proceedings before the district court. After the jury returned its verdict, the district court granted Northwest permission to interview jurors informally for its attorneys' education, as is within the court's power under Eastern District of Wisconsin Local Rule 8.07. Northwest's attorneys abused this grant of permission. The district court permitted them to interview jurors to learn which trial techniques worked and which did not, so that the attorneys could use the information for future trials. Instead, Northwest relied on its lawyers' post-verdict dialogue with the jury (during which, according to Northwest, jurors suggested that they found Hinckley to be a credible witness) to support its motions for overturning the jury verdict.

The conduct of Northwest's lawyers was clearly out of bounds. As the district court pointed out, Northwest inappropriately "invite[d] the court to open the black box that is the jury room." Northwest violated both Local Rule 8.07, by going far beyond the scope of the district court's permission, and Wisconsin Supreme Court Rule 3.5 (an exact copy of ABA Model Rule of Professional Conduct 3.5), which prohibits lawyers from communicating *ex parte* with

jurors "except as permitted by law." Wisc. Sup. Ct. R. 20:3.5. The district court appropriately chastised Northwest for its highly improper behavior.

Diettrich argues that Northwest's misconduct was sufficiently grave that this court should punish Northwest by affirming the jury's verdict. We agree that this was a serious transgression. Nevertheless, as in all cases the punishment must fit the crime. It is true that the federal courts have the inherent power to "fashion ... appropriate sanction[s] for conduct which abuses the judicial process," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1981), and that in appropriate cases this power would even permit a court to impose the ultimate sanction of a grant of judgment (or its equivalent, dismissal with prejudice). See *Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993); see also *Chambers*, 501 U.S. at 45. Nevertheless, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44. This court has repeatedly recognized the need to be cautious when imposing the draconian remedy of terminating the underlying action in favor of one party. *Kovilic Constr. Co., Inc. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997); *Barnhill*, 11 F.3d at 1167.

A number of reasons persuade us that affirmance of the jury verdict would not be the appropriate sanction here. Most importantly, Diettrich was not prejudiced by Northwest's misconduct. In evaluating Northwest's post-trial motions, the district court expressly stated that it would disregard Northwest's impermissible materials. Based on

permissible materials alone, the court found that Diettrich had submitted sufficient evidence to sustain the verdict. Thus, we are confident that Northwest's misconduct did not contaminate the district court's review.

We are equally certain that our own review is untainted by Northwest's improper reference to the jury deliberations. The key issue presently before us is the correctness of the district court's denial of Northwest's renewed motion for judgment as a matter of law, which is something we review *de novo*. *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996). We therefore neither can nor should take into account any evidentiary disputes, except insofar as their legitimate existence would support the district court's decision to allow the jury verdict to stand.

Our refusal to impose the sanction of affirming the jury's verdict does not mean that misconduct like Northwest's must go unpunished. We think the proper authorities in the first instance for reviewing this matter are the tribunals whose rules of conduct have been violated: that is, the District Court for the Eastern District of Wisconsin and the Supreme Court of Wisconsin, through the Wisconsin Board of Attorneys Professional Responsibility. Although the district court has already considered this matter once, it may wish to reconsider its evaluation of the proper course of action in light of our decision that Northwest is entitled to judgment as a matter of law. We also instruct the Clerk of this Court to forward a copy of this opinion to the Wisconsin Board for its information.

III

On the merits, Northwest argues that the district court should have granted its motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. In undertaking this task after a full trial, we do not need to march through the familiar steps of the indirect, burden-shifting method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* framework is designed to help plaintiffs raise an inference of discrimination during pretrial proceedings. After the trial on the merits, the burden-shifting apparatus has served its purpose and the required preliminary showings fall away. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Mattson v. Schultz*, 145 F.3d 937, 938 (7th Cir. 1998); *Achor v. Riverside Golf Club*, 117 F.3d 339, 340-41 (7th Cir. 1997); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). At this point, we need ask only whether the plaintiff was a victim of intentional discrimination, that is, whether Diettrich would have been re-hired if he had been younger and everything else had been the same. *Achor*, 117 F.3d at 340; *Gehring*, 43 F.3d at 343.

Diettrich's evidence of age discrimination was entirely circumstantial--a fact that in itself means little, if it would have permitted a reasonable jury to infer that he lost his job because of his age. Specifically, he argues that the interview process was administered unfairly and to his detriment. He points to evidence that Northwest never trained Hinckley to conduct interviews, that Hinckley abandoned the format set forth in Northwest's interview guide in favor of a more variable approach, that Hinckley asked Diettrich different and

"more difficult" questions than he did the other candidates, that Hinckley gave Diettrich a shorter interview than the others, and that Hinckley disregarded Diettrich's resume and cover letter and did not otherwise elicit information regarding Diettrich's extensive work history and experience in sales.

Unfortunately for Diettrich, even if this evidence showed that Northwest did not know how to conduct a reliable selection process, none of these flaws has a hint of age bias to it. It may be that the interview process did not measure the traits Northwest wanted in its reorganized sales force. It may be that Hinckley did not appreciate how aggressive and results-oriented Diettrich really is. But use of a subjective, even arbitrary, selection process is not proof of discrimination. See *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1031-32 (7th Cir. 1998); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515 (7th Cir. 1996). For all we know, Hinckley was not impressed with Diettrich for any one of a myriad of other, non-actionable reasons. For example, Hinckley may have decided that Diettrich was wrong for the job because Hinckley disliked the clothes Diettrich wore to the interview or he found Diettrich's conversation boring. If this were the case (and there is no evidence to suggest that it is), we might question the good sense of Northwest's hiring decisions, but we could not hold Northwest liable for discrimination. To prevail, Diettrich must provide evidence not only that he was treated differently, but that he was treated differently because of his age. This he never did.

Diettrich likens his case to *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125 (7th Cir. 1997), in which this court upheld a jury finding of discrimination even though the evidence of pretext was "tenuous." *Id.* at 1131. In *Tincher*,

the plaintiff presented evidence that her supervisors had responded to her requests for accommodation to her religious practices with arguably anti-religious statements. *Id.* Because some evidence tied the adverse job action to the protected category, the jury was entitled to decide the case. In contrast, most of Diettrich's evidence implies only that his supervisors had a flawed selection process, not that they had a discriminatory motive.

The one piece of evidence Diettrich offers that even arguably suggests that Hinckley's decision was influenced by his age is the pattern that emerges from the ratings Hinckley gave the 12 candidates who re-applied for the account manager positions. The youngest among the 12 received the highest score, while the three oldest applicants scored lowest. Diettrich is not trying to show that the scoring decisions had a disparate impact on Northwest's older employees--a theory of age discrimination that is unavailable in this circuit, see *Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 734-35 & n.4 (7th Cir. 1997); *Gehring*, 43 F.3d at 342. Instead, Diettrich wants to use the ratings to establish the proposition that Hinckley favored younger employees, which in turn would buttress his claim that the reason for his discharge was age.

This evidence will not bear the burden Diettrich asks of it. As his attorney acknowledged at oral argument, the sample of 12 is not statistically significant, which means that the correlations between age and score could have fallen as they did by pure chance. Moreover, statistical significance aside, this sample still would not permit an inference of age discrimination. There were enough jobs available for all 12 candidates, so Hinckley did not offer a limited number of jobs

to the youngest applicants. While it is true that the three oldest candidates received the three lowest scores, 11 of the 12 applicants--including the second- and third-oldest applicants (only one and two years younger than Diettrich)--received offers. Hinckley did not know the ages of the candidates, and by "eye-balling" alone he could not have determined that Diettrich was older than the two fifty-something candidates who did get jobs.

Reluctant as we are to overturn a jury verdict, we have no choice but to do so in a case like this, in which the evidence did not justify submitting the case to the jury in the first instance. The district court's denial of judgment as a matter of law is REVERSED, and the award of damages and attorneys' fees is VACATED.

FLAUM, *Circuit Judge*, concurring in part *and* dissenting in part. I join the court's opinion with respect to the merits resolution of this appeal. I write separately because I am unable to associate myself with my colleagues' disposition of the improper post-verdict conduct attributed to the attorneys for Northwest Airlines. Clearly, the misuse of the juror interviews deserves appropriate admonishment. As the record discloses, the district court addressed this subject when considering the post-trial motions. In this case an experienced jurist decided not to proceed beyond his critical comments of counsel. If he had chosen, as an initial matter, to impose a harsher sanction I would not take exception to such a result. However, I would not, in the context of this litigation and from our detached appellate vantage point, invite the trial judge to revisit the issue. Nor would I, in advance of further reflection by the district court, direct the Clerk of this Court to forward a copy of this opinion to the

Wisconsin Board of Attorneys Professional Responsibility. The violation of the Eastern District of Wisconsin Local Rule 8:07 has been duly noted by the district court and now by this tribunal in a published opinion. In my judgment, this dual recognition and condemnation of the performance in question should suffice.

A true Copy:

Teste: /s/_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed: June 25, 1997]

Civil Action No. 94-C-1066

STEFAN DIETTRICH,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.,
Defendant.

DECISION AND ORDER GRANTING FEES

Stefan Diettrich ("Diettrich") sued Northwest Airlines Inc. ("Northwest") for Age Discrimination. The parties agreed to sever the damage and liability phases of the trial. In May 1996, a jury found that Northwest discriminated based on age but did not find that the discrimination was willful. After a bench trial in January 1997, the court awarded Diettrich $7,311.23 in back-pay, largely rejecting his theory of damages. The court has denied Northwest's post-trial motions. Diettrich has requested $96,937.50 in attorney fees (which he later increased) and $4,779.75 in costs. The court grants the motion in part.

Two attorneys worked on the case for Diettrich: Attorney Curry First who charges $200.00 an hour and attorney Elizabeth O'Neill who charges $125 an hour. Diettrich only submitted the fees for the liability trial and for the post-trial motions; Diettrich submitted no fees for the preparation or presentation of the damage trial. (Replacement Aff. of Curry First ¶7).

Northwest agrees that the hourly rates are reasonable, but it challenges the number of hours the attorneys billed. Northwest makes three basic arguments: (1) the court must reduce the request substantially to discount the time spent on the damage portion of the case and on willfulness; (2) the court should reduce the fees significantly because Diettrich's results were modest, if not slight; and (3) Northwest challenges a number of specific entries on the fee petition.

As a prevailing party, Diettrich deserves reasonable attorney fees. See 19 U.S.C. § 626(b). The plaintiff deserves the reasonable amount of time multiplied by the reasonable hourly rate. When a plaintiff wins on some claims and loses on others, the plaintiff may recovery on the unsuccessful claims only if they are legally or factually related to the prevailing claim. Spellan v. Board of Educ., 59 F.3d 642, 645 (7th Cir. 1995). In that case, however, the court must consider the overall success of the law suit. Id. at 646; Zabkowicz v. West Bend Co., 789 F.2d 540, 551 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)). The fee applicant must establish the award and document both the hours expended and the reasonable rate. Zabkowicz, 789 F.2d at 548. The party opposing the fees must state objections with particularity. Hutchison v. Ameteur Elec. Supply, Inc., 42 F.3d 1037, 1048

(7th Cir. 1994). Although the court may reduce the fees to which no objection has been made, the court must first give the party seeking the fees a chance to defends its request. Spellan, 59 F.3d at 646.

Even though Attorney First did not include any of the time spent after the jury verdict (except for post-trial motions), Northwest believes he is trying to recover for time spent on damages before the first trial: "a substantial portion of First's time had to have been spent pursuing his theory of damages, including reinstatement, front pay, benefits and dual living expenses." (Def. Opp. Br. at 19.) The implication is staggering. In a sworn affidavit, First said he did not include any time after the jury trial because his client was unsuccessful on the damage phase. If First spent substantial time on the damage issue before the jury verdict, First knew it could not be counted. So, only if First was trying to deceive the court would he have included substantial time spent on damage issues (before the verdict). The court can be no more emphatic: nothing in the record supports such a distasteful allegation.

On the contrary, attorney First is an ethical, honorable attorney whose credibility and good-faith is manifest.[1] Moreover, he deducted a substantial amount of time when he submitted his fee petition. First has accounted for his time. (See Pl.'s Reply Br. at 10.)

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[1] First's reply brief is a perfect example of his integrity. Rather than rail at Northwest for implicitly questioning his truthfulness, First refutes the argument by categorizing his hours so that it is clear that he did not include time spent on the damage part of the case. See Pl.'s Reply Br. at 10.)

As to losing the willfulness claim, it is not a separate claim at all. In this case, Diettrich's proof of willfulness depended on largely the same witness and testimony as the liability issue. The issue was what inferences the jury would draw: no liability, liability without willfulness, or liability with willfulness. If Diettrich had not brought the willfulness allegation, his attorneys would have expended about the same amount of time. Therefore, the court sees no reason to reduce the award, because the willfulness claim was inseparable from liability and because, based on the overlap, the willfulness claim did not significantly affect the amount of time spent on the case.

Northwest, not overpreparation, dictated the amount of time Diettrich's attorneys spent on this case. Attorney First spent about 150 hours on trial preparation and 50 hours in trial. (See Pl.'s Reply Br. at 10 and Def.'s Opp. Br. at 19.) Northwest concludes the time was excessive because of the limited amount Diettrich could win. To the contrary, First could not have reduced the amount of trial time because he presented a bare-bones case; he avoided unnecessary information and redundant witnesses. Taking three hours of preparation for each hour of trial is not excessive or unreasonable. A good attorney who takes time to prepare understands the case better and saves time in presenting the case.

First spent much of his time parrying the thrusts of Northwest. Northwest decided to file a summary judgment motion; Northwest decided to file many briefs during trial; and Northwest decided to bring boxes and boxes of documents to trial which Diettrich's counsel had to review. In other words, Northwest's attorneys aggressively defended their client.

Certainly, Northwest has nothing to complain about the quality of the representation it received; its attorneys pursued every angle of defense diligently and competently.

At the same time, when it comes time for the court to award the fees, it must not penalize Diettrich's attorneys for responding to Northwest's defense. When a defendant files for summary judgment, the plaintiff's attorney must respond. When the defendant takes depositions, the plaintiff's attorney must prepare and review documents. When the defendant files briefs on a motion in limine, the plaintiff should take those arguments seriously. But, taking arguments seriously, preparing for depositions, and responding to summary judgment takes time, and time is expensive. Law is labor intensive; lawyers are paid for the diligence and the intelligence, commodities that cannot be mass produced on an assembly line.

Moreover, Northwest's comparison between what Diettrich received and what he sought is in error. Northwest compares the court award with the amount of damages claimed in a letter well before the first trial. Plaintiffs always cast the damage net as broadly as possible; that alone does not mean the eventual result is paltry. Otherwise, plaintiff's attorneys would face a conflict of interest. For their clients, they should be trying to recover as much in damages as possible. If courts are going to penalize plaintiffs' attorneys for not getting the best case scenario, however, the attorneys will have an incentive to undervalue a plaintiff's case. By undervaluing the case, a plaintiff's attorney could then claim that they achieved total success.

When a plaintiff has refused a settlement offer, however, then the comparison is valid. Attorneys are supposed to know a good offer when they see it; if they cannot convince

the client, they risk having their fees reduced. Here, Northwest has not alleged that Diettrich refused a settlement offer. Therefore, the comparison between what was sought (always a prediction seen through rose-colored glasses) and what was achieved is largely irrelevant.

Finally, Northwest makes specific challenges regarding O'Neill's time and First's time. As to O'Neill's time, Diettrich has conceded most of the objections. For the rest, the court agrees with Diettrich. Time spent organizing files helps lawyers organize the case, know where the evidence is, and make a more precise presentation. The court allows O'Neill's charges on 3/27/95, 6/26/95, 6/27/95, and 10/25/95. Diettrich also concedes one charge made by First. As to the others, they are reasonable. On 6/7/94, attorney First called the EEOC, and Diettrich can recover for time spent before the required administrative agency, and he reviewed the file and called the defense counsel. These are sufficiently specific. On September 6, 1994, First conferred with his co-counsel; absent extraordinary circumstances, the fee petition need not record the details of the meeting. On September 8, 1994, First reviewed the file and called his client. On May 10, 1994, First called Judge Donegan who was a member of the Milwaukee Convention Center; the call was relevant to Diettrich's sales approach and his effectiveness. Similarly, reviewing the files on 4/26/96 and 5/1/96 was reasonable.

The court finds the $2,245 spent on preparing the fee petition to be reasonable.

Northwest also challenges the costs because Diettrich has not documented them and has not filed them in accordance with 28 U.S.C. § 1920. Furthermore, Northwest also thinks the court should reduce the costs for the same reasons it should

reduce the fees. To begin, the costs are documented. The costs are in an exhibit to the First Affidavit. First swears that the costs are based on his records. Not only is the affidavit a sworn document, but by signing it, First must have complied with Fed. Civ. P. 11. As to the failure to comply with sec. 1920, the court finds this to be insubstantial. Finally, just as the court rejected Northwest's arguments on the attorney's fees, it rejects them on the costs as well.

CONCLUSION

From the original request of $96,937.50, the court reduces the fees by the amount's conceded by Diettrich ($2,137.50 from O'Neill's time and $40 from First's time) and adds $2,245 for the time spent on preparing the fee petition.

The court grants Diettrich $97,005.00 in attorney's fees and $4,779.75 in costs.

SO ORDERED this 25th day of June, 1997.

/s/_____
John W. Reynolds
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed: June 18, 1997]

Civil Action No. 94-C-1066

STEFAN DIETTRICH,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.,
Defendant.

DECISION AND ORDER DENYING POST-TRIAL MOTIONS

Stefan Diettrich ("Diettrich") worked as an account manager for Northwest Airlines, Inc. ("Northwest"). In the summer of 1992, Northwest reorganized its sales office and required all account managers to reapply. Russell Hinckley made the hiring decisions and used a structured interview. He scored Diettrich the lowest of all the applicants and did not offer Diettrich a job (this decision was not part of a reduction-in-force.)

In turn, Diettrich filed suit, alleging he was not offered a job because of his age. The parties agreed to sever damage and liability issues. After the court denied Northwest's motion

for summary judgment, a jury found that Northwest had discriminated against Diettrich but that the discrimination was not willful. On January 21, 1997, the court, after a two-day bench trial, awarded Diettrich $7,311.23 in damages. Northwest has moved for judgment as a matter of law, for a new trial, and for a reduction in damages. In response, Diettrich requests prejudgment interest and opposes Northwest's motion. The court denies Northwest's motions and denies Diettrich's request for prejudgment interest.

Judgment as a Matter of Law

The court denies the motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) as long as a reasonable jury could find for the nonmoving party. The court views the evidence in the light most favorable to the nonmovant, and accepts the nonmovant's view of all disputed evidence. Panter v. Marshall Field & Co., 646 F.2d 271, 281 (7th Cir.), cert. denied, 454 U.S. 1092 (1981). These rules are strict for a reason: juries, not judges, decide disputes of fact. Whenever a court reviews a verdict, there is a danger that it will impermissibly replace the jury's view with its own. Therefore, except in the rarest of circumstances, courts never inquire into a specific jury's decision-making process or reasoning; rather, the court decides what a reasonable jury could have done. Only if the actual jury's verdict falls beyond the scope of what a reasonable jury could decide, will the court grant a motion for judgment as a matter of law.

Northwest, however, invites the court to open that black box that is the jury room. During trial, Northwest moved for permission to speak with jurors for educational purposes, which the court granted. See Local Rule 8.07. In their reply brief, Northwest states

> Northwest, frankly, is surprised at Diettrich's argument about Hinckley's credibility. . . [T]he parties engaged in a post-verdict dialogue with the jury regarding the reasons for their verdict. The jury most certainly did not conclude that Hinckley lied. If Diettrich is suggesting to the Court that this jury did, the suggestion is both incorrect and improper.

(Def.'s Reply Br. at 6 n.2.)

Northwest's reference to its discussion with jurors, however, was incorrect and improper — not Diettrich's argument that a jury could or did decide that Hinckley was lying. As a practical matter, the discussion occurred off the record. More importantly, the court allowed Northwest to approach jurors so that Northwest's attorneys could learn what worked and what did not. The attorneys could use that information for future trials. Nowhere did the court suggest or imply that granting the motion was a fishing expedition for Northwest to gather arguments for reversing the verdict.

As the court has stressed, its role is to decide the scope of decisions a reasonable jury could make; why this jury decided the case the way it did is irrelevant to that decision. That is the foundation of a jury system. Northwest's reliance on its contact with jurors was improper and, by itself, justifies denying the motion for judgment as a matter of law.

Regardless, Diettrich submitted enough evidence for a reasonable jury to find discrimination. Diettrich relied on the indirect method of proving discriminatory intent. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). After Diettrich established a prima facie case and after

Northwest gave a legitimate nondiscriminatory reason for not rehiring Diettrich, Diettrich had to prove that the reason was pretextual. If a reasonable jury could infer that the employer's reason was a pretext, it could then infer that age was the actual reason for Hinckley's decision. See Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 115 S. Ct. 2612 (1995). Although the ultimate issue is whether Northwest discriminated against Diettrich because of Diettrich's age, this court, on a motion for judgment as a matter of law, need only decide whether a jury could infer that Hinckley's stated reason for not hiring Diettrich was a pretext.

Generally, plaintiffs prove pretext in one of three ways. One, the given reason has no basis in fact. Two, the reason did not actually motivate the employer. Three, the reason was an insufficient justification for the action. Jones v. Jones Bros. Const. Corp., 879 F.2d 295, 299 (7th Cir. 1989). Here, Hinckley said he relied on the structured interview to decide whether to rehire the salespeople; he did not use resumes, and he did not consider past experience. In Hinckley's view, in a structured interview, everyone gets the same questions and the interviewer can compare how different applicants answer the same questions.

Because Hinckley implemented the structured interview in a way that undermined the benefits he thought it provided, a jury could infer that those benefits were not the reason for using the structured interview. Although Hinckley was supposed to ask the same questions to all the candidates, he asked Diettrich more questions than any other candidate and

the more difficult questions. In Diettrich's expert's view, Diettrich had a harder interview than candidates who were significantly younger than he was.[1]

By giving Diettrich a more difficult interview, Hinckley undermined the very purpose of the structured interview. A jury could decide that Hinckley's explanation for the deviations was not believable (certainly, the jury could have interpreted his stiff and uncomfortable demeanor as further support for that conclusion). Once the jury decided that the structured interview was not followed or used, the structured interview was not the reason on which Hinckley relied; in other words, the structured interview was a pretext. The jury could further rely on the evidence that Diettrich's interview was more difficult than the younger employees.

The court denies the motion for judgment as a matter of law because the jury had sufficient evidence from which to infer age discrimination.

New Trial

In the alternative, Northwest moves for a new trial under Fed. R. Civ. P. 59. The court will grant a new trial only if the jury's verdict was against the clear or great weight of the evidence and if a new trial is necessary to prevent a miscarriage of justice. Fed. R. Civ. P. 59. Northwest gives six reasons for a new trial: First, the court allegedly should have included the

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[1] Diettrich's expert pointed to two reasons for his conclusion. First, Diettrich went first, which was random. Second, Diettrich had to answer more questions than other candidates. Based on the second reason, the jury could conclude that Hinckley gave Diettrich a more difficult interview.

word "intentionally" in the jury instructions. Second, the court gave the incorrect instruction on causation. Third, the court incorrectly instructed the jury about statistical evidence. Fourth, the court erred in excluding evidence that Hinckley selected four other candidates who were over forty for other positions. Fifth, the court erred in excluding testimony of witnesses — not involved in the employment decision — about Diettrich's performance. Sixth, the court should not have allowed Diettrich's expert to testify, and the court should not have said that an interview process could be sufficiently bad to establish pretext for age discrimination.

In attacking the jury instructions, Northwest confuses two related but different concepts: intent and motive. Brown v. M & M/Mars, 883 F.2d 505, 514 (7th Cir. 1989). A plaintiff can establish intent without any evidence of the employer's state of mind. Id. Intent is nothing more than the cause. When an employer intentionally discriminates against an employee, the employer is taking the action (the decision not to rehire) because of the employee's age. The court adequately instructed the jury that Diettrich had to prove that Hinckley decided not to hire him because of age. (See Jury Instructions Nos. 24-26, 29-30, and 32.) Adding the word "intentionally" would have added nothing to instructions.

Northwest argues that the court's instruction on willfulness shows the jury did not find intentional discrimination. In instructing on willfulness, the court told the jury to find willfulness if "the employer either knew or showed reckless disregard for the matter of whether his conduct was prohibited by the federal law under which Mr. Diettrich sues. A violation is willful if it is done voluntarily, deliberately, and intentionally and not by accident, inadvertence or ordinary negligence." (Tr. at 669-70.) The court's willfulness

instruction required a greater degree of culpability than intent. A willful act was voluntary and deliberate in addition to being intentional. The liability and willful instructions were consistent.

Northwest also challenges the court's instruction on causation. By instructing that Diettrich had to prove only that age was a motivating factor, the court, in Northwest's view, reduced the burden necessary for liability. The court's instructions included both "but-for causation" and "motivating factor":

> Now in order for Mr. Diettrich to prevail on his claim against Northwest Airlines for age discrimination in employment, Mr. Diettrich must prove the following three essential elements, again by preponderance of the evidence:
>
> First, that he is in the protected age group; that it, was 40 years of age or over. And everybody agrees that that's so.
>
> Second, that Northwest Airlines would have hired Mr. Diettrich if he had been younger than 40, and everything else had remained the same.
>
> And third, that Mr. Diettrich's age was a motivating factor in this action. That is, it was one of the reasons that prompted Northwest Airlines to take the action that it did.

> In showing that Mr. Diettrich's age was a motivating factor for the action, Mr. Diettrich is not required to prove that his age was the sole motivation or the primary motivation for Northwest's decision.
>
> On the other hand, your verdict should be for Northwest Airlines if you find that Mr. Diettrich has failed to prove that his age was a motivating factor in Northwest Airlines decision or conduct. Your verdict should be for Northwest Airlines if you find that Mr. Diettrich would have suffered the same consequences regardless of his age.

(Tr. at 668-69.) The court relied on Mayall v. Peabody Coal Co., 7 F.3d 570, 574 (7th Cir. 1993) and Gehring v. Case Corp., 43 F.3d 340, 344 (7th Cir. 1994). In Mayall, the Seventh Circuit approved the use of the phrase "a determining factor" to ensure that juries know that age does not have to be the only reason for the employment decision. Id. The Mayall court said that "a determining factor" has a clear meaning and is not a technical term. In Gehring, however, the court took a dimmer view of "a determining factor": "But 'determining factor' is not a term in common usage . . . Putting unusual terms in jury instructions does little beyond confusing the jurors." 43 F.3d at 344. Nevertheless, the Gehring court reaffirmed Mayall; however, Gehring suggested a less legalistic instruction: "You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same." Id.

Motivating factor is substantially the same as determining factor, and the court used it to ensure that the jury understood that age could be one of multiple factors. In addition, the court used Gehring's court instruction to ensure that the jury knew that Diettrich had to prove "but-for causation."

In attacking the instruction, Diettrich relies on Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995). Although Umpleby reversed a jury verdict where the trial court used the term "a determining factor," the trial court used the term in a special verdict question, and that question was the only question on liability. Id. at 213. Giving the term such prominence, in the Seventh Circuit's view, risked jury confusion. Id. Moreover, the jury instructions did not adequate correct any error because the trial court said that the plaintiff lost if age was not "a reason" for his termination. Id. at 214. Umpleby cited Gehring approvingly and said nothing about Mayall.

As long as Gehring and Mayall are good law, this court's instruction was correct. Unlike Umpleby, this court did not use "a determining factor" or "a motivating factor" in the verdict form. In addition, in describing "a motivating factor," the court did not say age only had to be a factor; rather, the court said age need not be the only factor but it had to be a but-for cause of the decision not to rehire Diettrich.

Northwest also argues that the court's instruction allowed the jury to consider the scores of the candidates as statistics. In its original instructions to the jury, the court told the jury not to consider the applicant's scores on the structured interview as statistical proof. (Tr. at 667.) When the jury asked the court about the scores, the court instructed the jury

that it had to find that Diettrich received his score because of his age. (Tr. 703.) Although the jury could not use the scores as proof that Diettrich's age was the determining factor in not being rehired, it could rely on the scores as evidence of different treatment. As the court emphasized when it reinstructed the jury, it had to find causation and intent from other evidence. The jury was not allowed to use the scores as statistical proof of causation, nor was the jury allowed to find liability solely on disparate impact. The instruction on the candidates' scores was proper.

Fourth, Northwest argues that the court should have allowed Northwest to present evidence of Hinckley's hiring decisions for other positions. Because this evidence was cumulative and would have expanded the trial unnecessarily and because Northwest was never justified that the other position was similar to the account manager position, the court's decision was correct.

Fifth, Northwest argues that the court should have allowed it to call Patricia Epting, Mike Heck, and Deborah Kreuer, who would have testified about Diettrich's performance. None these people made the decision to not hire Diettrich, and none of them passed their knowledge to Hinckley. Northwest says the testimony would have shown that Diettrich did not have the qualities Hinckley was looking for and to show that Hinckley's impressions were accurate. If these witnesses would have testified to the opposite, that Diettrich had the qualities Hinckley wanted, Northwest would have undoubtedly objected to their testifying. Their evidence was at best cumulative and unnecessary and at worst prejudicial.

Sixth, Northwest argues that the court should not have allowed the expert to testify and should not have said, in front of the jury, that a structured interview could be so bad that it would support an inference of pretext. (Tr. at 183.) In light of the jury instructions, the court's statement was no more than harmless error. Moreover, the court has already explained its view on the structured interview. If Hinckley said he was using a structured interview for certain benefits and if he then modified the structured interview so that it no longer provided those benefits, the reliance on the structured interview was pretextual.

Reduction in Damages

Northwest asks the court to reduce Diettrich's damages by $1,920, the amount of unemployment compensation. Before and at the trial on damages, Northwest argued that the court had to reduce the damages, citing law that the court had to deduct unemployment compensation. Northwest missed the Seventh Circuit controlling case; therefore, it argued from an incorrect legal position. In its decision, the court relied on Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162 (7th Cir. 1981), overruled on different grounds by Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988) and Perry v. Larson, 794 F.2d 279, 286 (7th Cir. 1986). Based on the principles in those cases, the court had discretion to decide whether to reduce Diettrich's damages. Because Northwest, in the damage trial, argued that it would have fired Diettrich during the December 1992 reduction-in-force, unemployment compensation was collateral to Diettrich's damages.

Northwest argues that the court should reduce the damages because Diettrich got a windfall; he received his account manager salary until the end of 1992 (his damages),

and he had a job on January 1, 1993. So, although he was unemployed for two months beginning in July 1992, his damages covered that period.

The court rejects this argument as it did before. To begin with, Northwest has not tied its argument to the appropriate legal standard. Northwest could be arguing that the court abused its discretion when it refused to deduct unemployment compensation or that it would have been a better decision for the court to deduct unemployment compensation. Moreover, Diettrich's windfall, by itself, however, cannot make the court's decision an abuse of discretion. If so, then deducting unemployment compensation would always be required, and that would contradict Syvock. Second, in the January 21, 1997 decision, the court acknowledged that Diettrich would receive a windfall. (See Jan. 21, 1997 Decision and Order at 11.) Northwest's motion raises an argument that the court has already rejected. Third, Northwest ignores the court's reasoning that, in this case, unemployment compensation is collateral.

Prejudgment Interest

Finally, the plaintiff asks the court to award prejudgment interest. The court denies the request because it is untimely. Because prejudgment interest is part of a plaintiff's compensation, Osterneck v. Ernst & Whinney, 489 U.S. 169, 175 (1989), a post-trial motion to award prejudgment interest is a Rule 59(e) motion. Id. at 176; McNabola v. Chicago Trans. Auth., 10 F.3d 501, 520. A party must make its Rule 59 motion within ten days of the entry of judgment, and the rules forbid the court from granting an extension.

Fed. R. Civ. P. 6(b). Diettrich's request, made in his response brief filed on February 25, 1997, was more than ten days after the entry of judgment on January 21, 1997.

Although Northwest made a timely Rule 59 motion and although a Rule 59 motion does allow the court to address issues not specifically mentioned in the motion, McNabola, 10 F.3d at 520, the court may only address issues related to the Rule 59 motion. In McNabola, after the defendant moved to reduce the damages as excessive, the plaintiff moved to amend the judgment under Rule 59(e) to include prejudgment interest. The request for prejudgment interest was not sufficiently related to the request to reduce damages; therefore, the motion for prejudgment interest was untimely. Id.

Diettrich's request is indistinguishable from McNabola. Northwest moved to reduce damages (specifically to deduct Diettrich's unemployment compensation), and, in his response brief, Diettrich requested prejudgment interest. Although Diettrich did not make a separate motion, his request is untimely, and he cannot rely on Northwest's motion.

CONCLUSION

The court denies Northwest Airlines, Inc.'s motion for judgment as a matter of law under Fed. R. Civ. P. 50.

The court denies Northwest Airlines, Inc.'s motion for a new trial under Fed. R. Civ. P. 59(a).

The court denies Northwest Airlines, Inc.'s motion for an amended judgment under Fed. R. Civ. P. 59(e).

The court denies Stefan Diettrich's motion for an amended judgment under Fed. R. Civ. P. 59(e).

SO ORDERED this 18th day of June, 1997.

/s/_____
John W. Reynolds
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed: November 8, 1995]

Civil Action No. 94-C-1066

STEFAN DIETTRICH, *Plaintiff*,	)
v.	)
NORTHWEST AIRLINES, INC., *Defendant*.	)

DECISION AND ORDER DENYING SUMMARY JUDGMENT

I. INTRODUCTION

Stefan Diettrich ("Diettrich") sues Northwest Airlines, Inc. ("Northwest"), for violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq. Allegedly, Northwest removed him from its sales force because of his age. Northwest has moved for summary judgment. For the purposes of this motion, Northwest concedes that Diettrich has made a prima facie case for age discrimination. As a practical matter. Diettrich concedes that Northwest has articulated a legitimate,

nondiscriminatory reason for his discharge. Because a reasonable jury could conclude that Northwest's reason was pretextual, the court denies summary judgment. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994).

II. FACTS

After graduating high school in 1959, Diettrich worked for North Central Airlines as a ticket agent. In April 1964, North Central promoted Diettrich to district ticket and sales representative. Initially, he worked in Minneapolis but eventually transferred to Milwaukee. After two mergers, North Central became a part of Northwest Airlines in 1986. Although his title changed from time to time, Diettrich's duties remained fairly constant from 1964 to 1992. Diettrich tried to convince travel agencies and businesses to use Northwest (or its predecessors). He made sales calls, talked with his customers, and solved his customers' problems.

By 1992, Northwest was in financial trouble, trouble exacerbated by American Airlines's new value pricing. In response, Northwest reorganized its sales force to focus on corporate accounts. No salesperson was guaranteed a job; instead, they all had to apply for the new positions. Although Northwest claims it wanted to increase its profit margin, Diettrich claims that Northwest continued its revenue growth policy.

In July 1992, Russell Hinckley ("Hinckley"), the Director of Sales for the Chicago district, interviewed Diettrich for the position of account manager. By its own job description, Northwest wanted account managers with college business degrees, airline experience, supervisory experience, experience in the travel industry, exposure to computer reservation

systems, and demonstrated persuasion and service abilities. Hinckley claims he wanted aggressive, result-oriented people. Although Hinckley used a structured interview in which all applicants were supposedly asked the same questions, Hinckley never received training, nor was he certified to give a structured interview. During the Diettrich's interview, Hinckley asked questions that he asked no other candidate and omitted other standard questions like "How did you get your job" and "Describe some ways you changed the job." Nevertheless, Hinckley relied almost entirely on the structured interview, ignoring performance reports and prior experience. In calculating the scores, Hinckley made several errors. Based on the interviews, Diettrich scored the lowest of any Northwest employee and was not offered a position.

III. ANALYSIS

Northwest makes two errors: it misinterprets the law and confuses inferences with factual finding. Northwest argues that Diettrich must have evidence that age was the motivating factor; without that, proving pretext is insufficient. Northwest is wrong. If a jury can conclude that Northwest's reason was pretextual, it can infer that age was a motivating factor. Anderson, 13 F.3d at 1124; see also Saint Mary's Honor Ctr. v. Hicks, __ U.S. __, 113 S. Ct. 2742, 2749 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination").

Northwest has a three-part justification for not hiring Diettrich. Northwest wanted energetic, aggressive, and result-oriented people. The structured interview was the sole -- or almost sole -- measure of those qualities. Diettrich failed to show those qualities in his structured interview.

A jury could conclude, however, that Northwest's justification is a pretext for two reasons. First, the qualities used by Hinckley disregard a major quality in the job description: experience. The job description does not mention "energetic, aggressive, or result-oriented," but it stresses experience in the airline industry, the travel industry, and sales. Ignoring the job descriptions, Hinckley picked criteria that disregarded past job performance and experience. If Hinckley's criteria differs from the job description (a question that the jury must decide), then Hinckley's qualities are not those needed for the job, and they are a cover or pretext for a different justification. Moreover, because Hinckley omitted questions like "How did you change job," he failed to asked Diettrich questions that related to the qualities Hinckley claimed to be looking for, which suggests that Hinckley's criteria were pretextual.

Second, if the structured interview was the sole basis for the decision, Northwest would have trained Hinckley to give the interview. At least, Hinckley should have followed it scrupulously, which he did not. Hinckley incorrectly calculated the scores of candidates to the detriment of Diettrich. Because the structured interview was flawed, a jury could conclude that the interview was a way to disguise a different decision-making process. The structured interview would be a pretext.

Although the jury can view the evidence differently, the court, at this stage, may not; it must draw all reasonable inference in favor of Diettrich. Illinois v. Bowen, 808 F 2d 571, 575 (7th Cir. 1986). For example, Hinckley may have applied his criteria in good faith, and any error between the job description and Hinckley's criteria may have been a misunderstanding. Alternatively, the jury may conclude Hinckley just rephrased the job description when he articulated his criteria. At the same time, however, because Hinckley hired account managers, one expects that he was aware of the appropriate criteria. If he did not apply those criteria, he did so intentionally.

Similarly, a jury may conclude that any flaws in the structural interviews were insignificant and unintentional, but that is an inference in Northwest's favor. The scoring errors may have been poor mathematics and irrelevant, but that depends on Hinckley's credibility. Not only is credibility generally beyond the scope of summary judgment, Courtney v. Biosound Inc., 42 F.3d 414, 418 (7th Cir. 1994), Hinckley's credibility is at issue. To the degree he justifies his own mistakes, the justifications are self-serving, and a jury may disregard them.

A jury can draw reasonable inferences which, in turn, lead to the conclusion that Hinckley's (and thereby Northwest's) justification was a pretext; Diettrich has met his burden. Therefore, the court denies the motion for summary judgment.

SO ORDERED this 7th day of Nov. 1995.

/s/_____
John W. Reynolds
United States District Judge

APPENDIX E

EXCERPTS FROM TRIAL TRANSCRIPT
(5/30/96)

* * *

[p. 403]

A. No, they did not.

Q. Now in July of '92 when you made the decision not to offer Mr. Diettrich a position in the management sales force, were you aware of the existence of the federal age discrimination laws?

A. Yes, I was.

Q. Were you trying to -- what effect did that have on your decision with Mr. Diettrich, your awareness of the laws, if any?

A. I felt like I was within the law.

Q. Now if Mr. Diettrich had given you the exact same answers on the structured interview questions that he in fact gave you, and everything else had been the same except that he was younger, would you have selected him for a position in the management sales force going forward after July of '92?

MR. FIRST: Your Honor, I have an objection. It's leading. It's testimony from the lawyer. It suggests an answer. We object to the question.

THE COURT: Well, of course it is all those things. But that's the issue, and he's --

MR. FIRST: I will stipulate to the answer.

THE COURT: Yes. He's not the named defendant, but he's sort of in the seat of the defendant.

MR. LEICHTLING: I think the jury should get to hear him answer.

[p. 404]

THE COURT: He can answer it.

MR. LEICHTLING: Go ahead, Russ.

A. I would have done exactly the same thing.

MR. LEICHTLING: Thank you. Your witness.

* * *

APPENDIX F

EXCERPTS FROM TRIAL TRANSCRIPT
OF CLOSING ARGUMENT
(6/4/96)

[p. 652]

* * *

So, that brings you to your job. And as my concluding comment, you have a tough job to do, and I understand that. Obviously Mr. Diettrich didn't get the position he wanted. That's hard. It made it the worst day of his life. The second worst day of his life. Made it hard on Russ Hinckley, and it's going to make it hard on you. But I know when the Judge instructs you about the law, you are going to do your job and you are going to put aside sympathy for Mr. Diettrich. Because Northwest isn't here. Northwest is the defendant, but Russ Hinckley is here. If you find in favor of Mr. Diettrich, that means you're finding that Russ Hinckley is a liar. And when Russ Hinckley said he did this not based on age, but because of his good faith belief that Mr. Diettrich didn't do well on that interview, you're calling him a liar and you are saying that he discriminated intentionally on the basis of age against Mr. Diettrich. He did not do that.

Russ isn't here to talk to you. I can only do it. I am asking you to follow the Judge's instructions and conclude that Northwest did not discriminate on the basis of age against Mr. Diettrich. He has failed to prove he would have gotten the job had he been younger. He's failed to prove that Northwest willfully discriminated against him because of his age. Thank you very . . .